

BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P.

ATTORNEYS AT LAW  
RALEIGH, NORTH CAROLINA

EDGAR B. FISHER, JR.  
W. ERWIN FULLER, JR.  
JAMES T. WILLIAMS, JR.  
WADE H. HARGROVE  
M. DANIEL MCGINN  
MICHAEL D. MEEKER  
WILLIAM G. MCNAIRY  
EDWARD C. WINSLOW III  
HOWARD L. WILLIAMS  
GEORGE W. HOUSE  
WILLIAM P.H. CARY  
REID L. PHILLIPS  
ROBERT A. SINGER  
JOHN H. SMALL  
RANDALL A. UNDERWOOD  
S. LEIGH RODENBOUGH IV  
MARK J. PRAK  
JILL R. WILSON  
MARC D. BISHOP  
JIM W. PHILLIPS, JR.  
MACK SPERLING  
JEFFREY E. OLEYNIK  
MARK DAVIDSON  
JOHN W. ORMAND III  
ROBERT J. KING III  
V. RANDALL TINSLEY  
S. KYLE WOOSLEY  
FORREST W. CAMPBELL, JR.  
MARCUS W. TRATHEN  
JAMES C. ADAMS II  
ELIZABETH S. BREWINGTON  
H. ARTHUR BOLICK II  
J. EDWIN TURLINGTON  
JOHN M. CROSS, JR.  
JENNIFER R. VAN ZANT  
KEARNS DAVIS  
DAVID W. SAR  
BRIAN J. McMILLAN  
DAVID KUSHNER  
CLINTON R. PINYAN  
COE W. RAMSEY  
ROBERT W. SAUNDERS  
GINGER S. SHIELDS

CHARLES E. COBLE  
CHARLES F. MARSHALL III  
PATRICK J. JOHNSON  
STEPHEN G. HARTZELL  
J. BENJAMIN DAVIS  
JULIA C. AMBROSE  
DARRELL A. FRUTH  
IAIN MACSWEEN  
NICOLE A. CRAWFORD  
ALEXANDER ELKAN  
PATRICIA W. GOODSON  
SUSAN M. YOUNG  
MELISSA H. WEAVER  
WALTER L. TIPPETT, JR.  
KATHERINE J. CLAYTON  
ELIZABETH E. SPAINHOUR  
BENJAMIN R. NORMAN  
WES J. CAMDEN  
CHARLES S. BALDWIN IV  
ADAM P.M. TARLETON  
D.J. O'BRIEN III  
ANNA P. McLAMB  
CHARNANDA T. REID  
ANNA P. McLAMB  
JOSEPH A. PONZI  
ERIC M. DAVID  
CLINT S. MORSE  
DAVID D. SMYTH III  
EDWIN L. WEST III  
THOMAS G. VARNUM  
REBECCA L. CAGE  
BRYAN STARRETT  
DANIEL F.E. SMITH  
W. MICHAEL DOWLING  
JUSTIN N. OUTLING  
STEPHEN WILSON QUICK  
TIMOTHY G. NELSON  
CRAIG D. SCHAUER  
KIMBERLY M. MARSTON  
ANDREW L. RODENBOUGH  
CAITLIN M. POE  
ELIZABETH L. TROUTMAN  
MATTHEW B. TYNAN

MAILING ADDRESS  
POST OFFICE BOX 1800  
RALEIGH, N.C. 27602

TELEPHONE (919) 839-0300  
FACSIMILE (919) 839-0304

WWW.BROOKSPIERCE.COM

OFFICE ADDRESS  
1600 WELLS FARGO CAPITOL CENTER  
150 FAYETTEVILLE STREET  
RALEIGH, NC 27601

HENRY E. FRYE  
OF COUNSEL  
WILLIAM G. ROSS, JR.  
OF COUNSEL

SARA R. VIZITHUM  
OF COUNSEL

ANN H. STUART  
OF COUNSEL

FOUNDED 1897

AUBREY L. BROOKS (1872-1958)  
W.H. HOLDERNESS (1904-1965)  
L.P. MCLENDON (1890-1958)  
KENNETH M. BRIM (1898-1974)  
C.T. LEONARD, JR. (1929-1983)  
THORNTON H. BROOKS (1912-1988)  
G. NEIL DANIELS (1911-1997)  
HUBERT HUMPHREY (1928-2003)  
L.P. MCLENDON, JR. (1921-2010)

OTHER OFFICES  
GREENSBORO, NC  
WILMINGTON, NC

August 25, 2015

WRITER'S DIRECT DIAL  
(919) 834-9216  
Email: whargrove@brookspierce.com

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20544

Notice of *Ex Parte*  
Communication  
MB Docket No. 1071

Dear Ms. Dortch:

On Monday, August 24, 2015, Ralph Oakley, Jordan Wertlieb (Chair and Immediate Past Chair, respectively, of the NBC Television Affiliates), Mark Prak, and the undersigned (counsel to the NBC Television Affiliates) met with the following officials of the Commission to discuss the *Notice of Proposed Rulemaking* in the above-referenced docket concerning the Commission's television broadcast program exclusivity rules: Commissioner Pai and his Legal Advisor, Allison Nemeth; Commissioner Clyburn and her Chief of Staff and Media Legal Advisor, Chanelle Hardy; Commissioner O'Rielly; and the following officials of the Commission's Media Bureau: Mary Beth Murphy, Michelle Cary, Nancy Murphy, Steven Broeckaert, and Kathy Berthot.

Representatives of the NBC Television Affiliates affirmed their support for retention of the Commission's network non-duplication and syndicated program exclusivity rules for the reasons stated in Comments earlier filed in the above-referenced proceeding. During the

Ms. Marlene H. Dortch  
August 25, 2015  
Page 2

meetings, they discussed the following: The Commission's program exclusivity rules were originally enacted pursuant to the Commission's statutory mandate to establish a system of *local* television broadcast service, and, although the various means of distribution of video programming have changed since the rules were originally adopted, the core Congressional statutory mandate of the Commission to assure a system of *local* television broadcast service has not changed; the program exclusivity rules are inextricably linked to cable television's compulsory copyright license, Congress relied upon the Commission's exclusivity rules in enacting the compulsory copyright license; and repeal of the exclusivity rules would provide an unfair competitive regulatory advantage to cable television systems with whom local television broadcast stations directly compete for viewers and advertising revenue as well as providing cable television systems with an unfair competitive advantage over direct satellite-to-home satellite systems that, by statute, must afford *local* stations program exclusivity against the importation of duplicating, distant television stations.

The Commission's officials were provided a copy of the attached document reflecting the extent to which the Commission has previously articulated the rationale stated above for enactment of the rules and reinstatement of the syndicated exclusivity rule after having previously repealed it, and the document includes statements from Congress affirming its reliance on the Commission's program exclusivity rules in enacting the cable compulsory copyright license. Given the inextricable link between the cable compulsory copyright license and the Commission's rules and the statutory mandate under Section 307(b) to establish a system of local broadcast service, the Commission is without authority to repeal the exclusivity rules in the absence of the consent of Congress.

If you should have any questions in connection with this matter, it is respectfully requested that you communicate with this office.

Very truly yours,

  
Wade H. Hargrove  
Counsel to the NBC Television Affiliates

Enclosure

cc: Commissioner Pai  
Commissioner Clyburn  
Commissioner O'Rielly  
Allison Nemeth  
Mary Beth Murphy  
Steven Broecker  
Nancy Murphy  
Michelle Cary  
Kathy Berthot

## The Statutory Mandate for the Program Exclusivity Rules

### I. The Commission's Statutory Obligation

1. It is a *core* statutory responsibility of the Commission under Sections 303(g) and 307(b) of the Communications Act to establish and promote a nationwide system of *local* broadcast service. In adopting the Program Exclusivity Rules in 1965, the Commission said:
  - “The fundamental statutory responsibilities of the Commission are clear. The Commission is charged with the duty of executing the policy of the Communications Act to ‘make available, so far as possible, to all people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communications service’ (47 U.S.C. 151) and ‘generally to encourage the larger and more effective use of radio in the public interest’ (47 U.S.C. 303(g)). The Commission is also required to ‘make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.’” (47 U.S.C. 307(b)). *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, First Report and Order, 30 Fed. Reg. 6038, 6044, 38 F.C.C. 683, ¶ 40 (1965) (“1965 Network Exclusivity Order”).
  - “The Commission’s statutory obligation is to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis (Secs. 1 and 307(b) of the Communications Act).” *1965 Network Exclusivity Order*, 30 Fed. Reg. at 6044, ¶ 44.
  - “Authority for the rules adopted herein is contained in sections 4(1), 303, 307(b), 308, 309, 310, and 319 of the Communications Act of 1934, as amended.” *1965 Network Exclusivity Order*, 30 Fed. Reg. at 6060, ¶ 162.
2. Moreover, Congress directed the Commission in Section 303(h) “to establish areas or zones to be served by any station.” 47 U.S.C. § 303(h). It also authorized the Commission to “to make special regulations applicable to radio stations engaged in chain broadcasting”—that is, to establish rules for network broadcasting. 47 U.S.C. § 303(i).
3. The Commission recognized in 1965, when it first implemented program exclusivity rules, that program exclusivity serves the public interest:
  - “Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station’s ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that

a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest." *1965 Network Exclusivity Order*, 30 Fed. Reg. at 6047, ¶ 57 (footnote omitted).

## II. Congress Enacted the Cable Compulsory License in Reliance on the Commission's Program Exclusivity Rules

- "[A]s the *Malrite* [*T.V. of N.Y. v. FCC*, 652 F.2d 1140 (2d Cir. 1981)] court observed, the Copyright Act expressly recognizes the 'legitimacy within the statutory plan' of FCC modifications to the compulsory licensing system through revisions to its program exclusivity rules. *Id.* at 1147. Thus, prior to passage of the Copyright Act, the Commission urged that a revised copyright law leave detailed regulation of cable television signal carriage to administrative control, because '[e]xclusivity is a complex, dynamic subject that is most appropriately a matter for agency action.' In response, Congress deliberately chose to leave regulatory responsibility over matters like program exclusivity to this agency. Thus, section 111(c)(1) of the Copyright Act grants cable systems a compulsory license to retransmit broadcast signals the carriage of which is 'permissible under the rules, regulations or authorization of the Federal Communications Commission,' 17 U.S.C. Section 111(c)(1). In discussing this provision, the House Report explained that

any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulation adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting 'communications policy,' the Committee has been cognizant of the interplay between the copyright and communications elements of the legislation."

"Congress was thus aware that there is close interplay between communications policy and the intellectual property issues addressed in the Copyright Act, concluding, in effect, that cable operators should not receive the benefits of a compulsory license for the carriage of signals that the Commission deems impermissible for communications policy purposes. Apart from the basic compulsory license scheme, however, Congress did not statutorily define the boundaries of intellectual property issues and communications policy concerns. Instead, recognizing our legitimate interest in this area, Congress removed itself from this arena and left enactment of any program exclusivity rules to our future discretion." *1988 Program Exclusivity Order*, 3 FCC Rcd at 5321, ¶129 (quoting 252 H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976)) (footnotes omitted).

- “Furthermore, Congress was aware of the Commission’s syndicated exclusivity rules and expressly accommodated them within the new Copyright law. Thus, section 801(b)(2)(c) gives the Copyright Royalty Tribunal authority to adjust royalty payments for the compulsory license in order to reflect any subsequent changes in the Commission’s 1972 syndicated exclusivity rules. The House Report explained that “[i]f these rules are changed in the future to relax or increase the exclusivity restrictions, . . . the royalty rates paid by cable systems should be adjusted to reflect such changes.” The Copyright Act thus did not supplant FCC authority over program exclusivity provisions; rather, it accommodated our authority within the statutory scheme of the Copyright Act. In short, the Copyright Act forecloses only FCC rules, like retransmission consent proposals, that fundamentally change the compulsory license scheme. Congress recognized, however, that communications policy makers have a legitimate interest in program exclusivity arrangements. Therefore, it expressly permitted modifications to the compulsory license scheme through amendments to the FCC’s program rules. *1988 Program Exclusivity Order*, 3 FCC Rcd at 5321, ¶ 130 (footnotes omitted).
- “Although cable systems pay compulsory license fees when they carry distant signals, these fees bear no direct relationship to the value of specific programs carried on specific distant signals. Although cable systems pay compulsory license fees when they carry distant signals, these fees bear no direct relationship to the value of specific programs carried on specific distant signals. Thus, distant stations will be carried as long as their value to the cable operator exceeds the compulsory license fee, even if the value of these distant signals to viewers is less than the value of the alternative programs that cablecasters would carry if broadcasters could exercise exclusive rights, so that cable operators would have to negotiate to obtain the right to show duplicative programming.” *1988 Program Exclusivity Order*, 3 FCC Rcd at 5310, ¶ 69.

### **III. The Basis for the Commission’s Decision to Reinstate the Syndicated Program Exclusivity Rules Subsequent to an Earlier (and, In Its Own Words, “Misdirected”) Decision by the Commission to Repeal Those Rules**

1. The Commission’s 1988 decision to reinstate the syndicated program exclusivity rules just 8 years after it had repealed them emphasized that the Rules promote competition in the local television distribution market and thereby serve the public interest:
  - “Further analysis leads us to conclude, moreover, that the reasoning that shaped the 1980 decision to repeal the syndicated exclusivity rules was flawed in two significant respects. First, the Commission justified the rules’ repeal based on an analysis of how their repeal or retention would affect particular competitors, rather than competition itself, in the local television distribution market. We now recognize that the focus of our inquiry was misdirected to the extent that it examined the effects of repeal or retention on individual competitors rather than on the manner in which the competitive process operates. Second, the



Commission failed to analyze the effects on the local television market of denying broadcasters the ability to enter into contracts with enforceable exclusive exhibition rights when they had to compete with cable operators who could enter into such contracts.” *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299, 5303, ¶ 23 (1988) (footnote omitted) (“1988 Program Exclusivity Order”).

- “Nevertheless, it should be clearly understood that in addition to the deleterious effects on the competitive process, as outlined in the remainder of this paragraph, individual firms that would have benefited from playing by the same rules as their competitors are nevertheless harmed by the absence of syndicated exclusivity protection. *1988 Program Exclusivity Order*, 3 FCC Rcd at 5303, ¶ 23, n.52.
- “We are, therefore, no longer prepared to conclude, as we did in 1980, that the impact of repealing syndicated exclusivity rules on program supply would be small; we believe instead that, while that impact cannot be precisely ascertained, it could be quite significant. The consequence for broadcasters and viewers alike from any such effects on incentives to produce original cable programming, and real diversity for viewers that may occur are clearly harmful.” *1988 Program Exclusivity Order*, 3 FCC Rcd at 5307, ¶ 44 (footnote omitted).
- “Similarly, by repealing syndicated exclusivity in 1980, the Commission mistakenly cast the argument in terms of whether broadcasters could survive in an environment in which they could not enforce exclusive contracts. Perhaps they can, but the proper question is not whether broadcasters can survive. The proper question is: how does the presence or absence of syndicated exclusivity affect the viability and strength of competition, and through this, achieve various consumer benefits, including program choice?” *1988 Program Exclusivity Order*, 3 FCC Rcd at 5308, ¶ 52 (footnotes omitted).
- “In fulfilling our responsibility under Sections 301, 307(b), and 309, we believe the public interest requires that free, local, over-the-air broadcasting be given full opportunity to meet its public interest obligations. An essential element of this responsibility is to create a local television market that allows local broadcasters to compete fully and fairly with other marketplace participants. Promoting fair competition between free, over-the-air broadcasting and cable helps ensure that local communities will be presented with the most attractive and diverse programming possible. Local broadcast signals make a significant contribution to this diverse mix. As we documented previously, the absence of syndicated exclusivity places local broadcasters at a competitive disadvantage. Lack of exclusivity protection distorts the local television market to the detriment of the viewing public, especially those who do not subscribe to cable. Our regulatory scheme should not be structured so as to impair a local broadcaster’s ability to compete, thereby hindering its ability to serve its community of license. Restoration of our syndicated exclusivity rules will provide more balance to the

marketplace and assist broadcasters in meeting the needs of the communities they are licensed to serve." *1988 Program Exclusivity Order*, 3 FCC Rcd at 5311, ¶ 74.

- "Our analysis demonstrates that syndicated exclusivity rules are an important component of a sound communications policy designed to foster full and fair competition among competing television media. Without syndicated exclusivity, there is a likelihood that programs will not be distributed efficiently among alternative outlets and that viewers will not get the most efficient quantity and diversity of programming." *1988 Program Exclusivity Order*, 3 FCC Rcd at 5311, ¶ 75.
- "The ability of broadcasters to compete at optimum levels, free of unfair competitive burdens, is a proper concern of this agency insofar as such policies are designed to improve communications services to the public. We need not demonstrate that the very survival of broadcasting is at risk in the absence of syndicated exclusivity rules in order to conclude that the competitive well-being of broadcasters, a concern certainly within our jurisdiction, will be enhanced by the adoption of such rules. We have already explained why adoption of these rules will eliminate a competitive advantage held by cable that undermines our reliance on full and fair competition to achieve our statutorily mandated goals. We have also explained why elimination of that imbalance should lead to greater diversity in the programming available to the viewing public -- whether that public does its video viewing on cable or broadcasting stations. Accordingly, we think the matters addressed in these rules are squarely within our jurisdiction." *1988 Program Exclusivity Order*, 3 FCC Rcd at 5321, ¶ 131 (footnotes omitted).

\* \* \*